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IN THE

# Supreme Court of the United States

**October Term, 1965**

## No. 659

FRANK ROSS,

*Petitioner,*

—versus—

F. E. STANLEY, W. J. BOWEN, HAROLD A. MARTIN, O. PAUL HERZIG, MIDWESTERN CONSTRUCTORS, INC., WALCO ENGINEERING & CONSTRUCTION COMPANY (individually and as joint venturers doing business under the firm name and style of MIDWESTERN-WALCO CONTRACTORS), BARNARD AND BURK PIPELINE ENGINEERING COMPANY, INC., HARBERT CONSTRUCTION CORPORTION, FLORIDA GAS TRANSMISSION COMPANY and FLORIDA GAS COMPANY,

*Respondents,*

—and—

JOHN M. HARBERT III, LEON M. PAYNE, THEODORE RINEHART, CHARLES C. BARNARD, JACK S. BURK and PAUL C. WALLACK,

*Defendants.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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*Defendants.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Frank Ross, the plaintiff-appellant below, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit of June 1, 1965 and its order denying rehearing of July 13, 1965.

### Opinions Below

The opinion of the District Court for Middle Florida (R 127)* and the prevailing, concurring and dissenting opinions of the Fifth Circuit (pp. 1a, 12a, 17a)* have not or not yet been reported.

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* Citations to pages of the record below are prefaced by the letter "R". Citations to pages of the Appendices to this petition are followed by the letter "a".

## Jurisdiction

The District Court's jurisdiction was invoked on the ground of diversity of citizenship and jurisdictional amount, 28 USC § 1332 (R 44-46). The judgment of the Court of Appeals was entered June 1, 1965 (p. 1a). Its order denying petitioner's timely application for rehearing (p. 21a) was entered July 13, 1965 (p. 27a). This Court's jurisdiction is invoked under 28 USC § 1254(1).

## Questions Presented

1. Where the District Court dismissed petitioner's claim *without prejudice* as premature (thus preserving his right to renew the action later) and *only petitioner appealed,* did the Court of Appeals err in dismissing the claim *with prejudice* as barred by limitations (thus cutting off petitioner's right preserved by the District Court)?

2. In this stockholder's action brought on behalf of a publicly held natural gas company against its fiduciaries for securing to themselves $8,000,000 of profits contrary to the Natural Gas Act, 15 USC §§ 717 et seq., with the result that the Federal Power Commission denied the company the right to recoup this sum as part of its rate base, did the Court of Appeals err in holding that the statute of limitations had begun to run at a time when actually no action could have been brought because the company had not yet suffered any loss and the defendants had not yet realized any profit and no certainty existed that losses or profits would ever accrue?

3. Did the dismissal of the action on this ground deprive the natural gas company and its public stockholders of all effective remedy against their wrongdoing fiduciaries, contrary to the purpose and policy of the Natural Gas Act, which require that a natural gas company, upon losing part of its invested capital through the exclusion from its rate base of the profits made by its fiduciaries in the construction of its plant, be able to recover such loss from the guilty fiduciaries?

4. Did the Court of Appeals err in holding that petitioner's claims are barred by the statute of limitations?

## Statutes Involved

Pertinent parts of §§ 2 and 6 of the Natural Gas Act, 15 USC §§ 717a and 717e, of § 208 of the Federal Power Act, 16 USC § 824g, and of § 95.11(5) of the Florida Statutes (1963) are set forth in Appendix D (pp. 28a-29a).

## Statement

### The Complaint.

Petitioner, a stockholder of respondent Florida Gas Company ("FGC"), brought this action derivatively on behalf of FGC and its wholly owned subsidiary, respondent Florida Gas Transmission Company ("Transmission") (R. 46). The real defendants are the directors of the gas companies and four construction and engineering firms (the "contracting firms") owned or controlled by the directors (R 47-52).

Transmission owns and operates an interstate pipeline carrying natural gas from Texas to Florida. It is a "natural gas company" under § 2 of the Natural Gas Act (*infra* p. 28a); as such, it is subject to the jurisdiction of the Federal Power Commission ("FPC") (R 47).

The FPC sets the rates of pipeline companies so as to allow them a reasonable return on the "actual legitimate cost" of their properties; see § 6 of the Act (*infra* p. 28a). This cost is the rate base. In order to prevent the artificial inflation of the rate base, the FPC excludes from it, as not "legitimate", any cost item which represents profits made by an "affiliate" (the "no-profit-to-affiliates rule"). The reason underlying this federally based rule is that "contracts between affiliated companies [are] not entered into at arm's-length" and that "a trustee ought not to make a profit dealing with a trust"; *St. Croix Falls M.I. Co.*, 3 F.P.C. 13, 20, 21 (1942) (R 53).

A pipeline investment excluded from the rate base under this rule is, in effect, lost to the company, because it produces no return and cannot be amortized (R 52-53).

The four contracting firms, the directors, their representatives and associates were the controlling stockholders of Transmission and were, therefore, "affiliates" within the FPC's rule (R 70-71). In November 1958, when the building of the pipeline was to start, defendants caused Transmission to award substantial construction and engineering contracts to the four firms (R 67-69). The terms of the contracts were such as to afford the firms a reasonable prospect, but no assurance of profits (R 68-69; p. 22a).

By the time the pipeline was completed in 1960 (R 48), the four firms realized about $8,000,000 of profits (R 54, 68; p. 47a). In early 1962, the FPC's staff instituted proceedings before the Commission to eliminate respondents' profits from Transmission's rate base; as a consequence, the FPC entered a consent order of June 8, 1962 temporarily reducing Transmission's rates, although without prejudice to the FPC's ultimate determination of the rate base issue (R 53-55).

Two months later this action was commenced on August 3, 1962 (R 15). The complaint (R 44) alleges that, "If the FPC ultimately eliminates [respondents' profits] from Transmission's rate base * * *, Transmission's pipeline investment will be lost to the extent of the cost items so eliminated"; and it adds that Transmission has already "suffered substantial injury and damages by reason of the FPC's aforesaid order of June 8, 1962" (R 55). Respondents, as directors or persons in control, were fiduciaries (R 70). They knew or should have known that the award of the contracts to affiliates exposed Transmission to the danger that the FPC might eliminate their profits from the rate base (R 71). They should have avoided this danger by awarding the contracts to non-affiliates or by themselves taking the contracts at cost (R 71). The complaint prays for an accounting of respondents' profits and of the losses of the gas companies (R 76).

**The statute of limitations.**

Respondents moved, without answering, to dismiss the complaint on the ground, among others, that the action was barred by the three-year Florida statute of limitations, § 95.11(5) Fla. Stat. (*infra* p. 29a). For purposes of the statute of limitations, we summarize:

The action was commenced on August 3, 1962, more than three years after the award of the contracts in November 1958. However, in November 1958 respondents had realized no profits, the gas companies had sustained no damages, and it was completely uncertain whether any profits would ever arise or, if they did, whether they would be excluded from the rate base. Respondents themselves have conceded that the uncertainty of profits and damages would have prevented the institution of suit in November 1958 (p. 22a):

> "Whether the contracting firms 'would profit' • • • was 'speculative and uncertain,' not a fact on which a cause of action can be based. Indeed, the contracting firms when agreeing for a firm price to render the services stood not only possibly to make a profit, but to the contrary stood to sustain a loss."

The action was commenced *less than three years* after respondents realized their profits in 1960; and less than three years after these profits resulted in the FPC's rate reduction order of June 8, 1962. Indeed, the action was commenced *before* the FPC's decision (to be presently mentioned) which actually eliminated the profits from the rate base.

**The District Court decision.**

The District Court disposed separately of the claim for the damages of the gas companies and the claim for the profits of respondents. It dismissed the damage claim as barred by limitations; and it dismissed the profit claim as premature because the FPC had not yet decided the rate base proceeding (R 130-2). The dismissal of the profit claim was *without prejudice* to the institution of a further action after the FPC would render its final decision (R 133).

**The FPC decisions.**

Only petitioner appealed from the District Court's decision. While the appeal was pending, the FPC rendered its decisions eliminating defendants' profits of about $8,000,000 from Transmission's rate base and overruling two successive motions for rehearing (Opinions No. 431 of June 8, 1964; No. 431-A of August 5, 1964; No. 431-B of October 2, 1964).*

Since a federal appellate court may take judicial notice of the acts and decisions of a federal administrative agency,** the parties submitted copies of the FPC decisions to the Court of Appeals; and copies thereof are annexed hereto as Appendices E, F and G (pp. 30a, 82a, 101a).***

The FPC decisions reveal the cardinal importance of petitioner's claims to the regulatory scheme of the Natural Gas Act. Thus, Commissioner O'Connor's dissenting opinion objected to the application of the no-profit rule because of its disastrous impact on Transmission and its stockholders (p. 94a):

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* Petitions to review these decisions are pending in the Court below.

** *Chas. C. Steward Mach. Co.* v. *Davis*, 89 F. 2d 207, 210 (Cir. 5, 1937), aff'd 301 U.S. 548 (1937); *Interstate Natural Gas Co.* v. *Southern California Gas Co.*, 209 F. 2d 380, 385 (Cir. 9, 1953); *Fletcher* v. *Jones*, 105 F. 2d 58, 61-62 (Cir. D.C., 1939), cert. den. 308 U.S. 555.

*** Petitioner moved in the Court of Appeals for leave, if necessary, to plead the FPC decisions by supplemental complaint, Rule 15(d) FRCP, but the Court did not reach or pass on the motion. The propriety of such a motion at the appellate stage is well settled; *Texarkana* v. *Arkansas Louisiana Gas Co.*, 306 U.S. 188, 202-3 (1939); *Porter* v. *Block*, 156 F. 2d 264, 271 (Cir. 4, 1946); see *Ballard* v. *Searls*, 130 U.S. 50 (1889); *Fujii* v. *Dulles*, 224 F. 2d 906, 907 (Cir. 9, 1955).

> "Thus, the net effect of the majority's decision is to preclude from recovery, through the allowance for depreciation, over $8,000,000 in plant costs; to give solely to the ratepayers the $4,000,000 benefits of a legitimate tax deduction; and to deny a return to investors of over $7,375,000. The impact, obviously, falls upon the investor but for whom this concededly valuable project could never have been financed. The unfortunate investor, lulled into a regrettably false sense of security by regulatory inaction, now finds himself entrapped through no fault of his own." (Footnote omitted.)

In response to this argument, Chairman Swidler's majority opinion held (p. 89a):

> "Commissioner O'Connor's dissent points to possible losses to investors. Where such losses are the result of insiders' profits, the investors may have legal remedies through the courts, whereas the consumers must depend upon the action of the regulatory bodies having rate and accounting jurisdiction."

As postulated by the FPC, the present action seeks the legal remedies for the losses sustained by Transmission as "the result of insiders' profits".

**The Court of Appeals decision.**

The majority of the Court below held that petitioner's claims for damages as well as profits accrued in November 1958 and are, therefore, barred by Florida's three-year statute of limitations (pp. 1a, 12a). It affirmed the District Court's dismissal of the damage claim, but directed that the profit claim be likewise dismissed with prejudice (pp. 2a, 11a-12a, 16a-18a).

The prevailing, concurring and dissenting opinions in the Court of Appeals are at odds with each other and with the decision of the District Court.

Chief Judge Tuttle recognized that "The true essence of the appellant's grievance * * * is [the] exclusion [of respondents' profits] from Transmission's rate base with the consequent damage to the corporation" (p. 11a). Neither of these essential facts—respondents' profits and their exclusion from the rate base—existed in November 1958; and admittedly it was quite uncertain at that time whether they would ever exist (p. 22a). Nevertheless, Judge Tuttle held that this action could have been "maintained to a successful result" in November 1958 (pp. 6a-7a, 11a), on the theory that only the "amount" of damages remained to be "computed" or "ascertained" at a later date (pp. 9a, 10a) and that this uncertainty "was the very circumstance that required the filing of proceedings of an equitable nature" (p. 10a). His opinion does not state what kind of "successful result" could have been achieved if this action had been brought and tried before a court of equity in November 1958; nor does it state what damages Transmission would have suffered if respondents had realized no profits in 1960 or if, in 1964, the FPC had not excluded the profits from the rate base.

Judge Simpson's concurring opinion, contrary to Judge Tuttle's, held that petitioner's remedy at law for money had and received was adequate (p. 13a); and it held, contrary to all authorities, that not only an actual but a "potential" wrong starts the running of limitations (pp. 15a-16a).

Judge Rives, dissenting, held that petitioner's claims could not accrue unless and until respondents realized profits and the FPC eliminated them from the rate base (pp. 18a-20a). He further held that the Court of Appeals had no power to dismiss the profit claim "with prejudice", since the District Court had dismissed it "without prejudice" and only petitioner had appealed (pp. 17a-18a).

## REASONS FOR GRANTING THE WRIT

### I.

**In passing on the statute of limitations, the Court of Appeals**

**a) has decided an important question of federal law which has not been, but should be, settled by this Court, and**

**b) has decided an important state question in a way in conflict with applicable state law.**

#### 1. Petitioner's claims are an essential ingredient of the regulatory scheme of the Natural Gas Act and the Federal Power Act.

The no-profit-to-affiliates rule has been developed under § 6 of the Natural Gas Act (p. 28a) and its statutory model, § 208 of the Federal Power Act, 16 USC 824g (pp. 28a-29a). It has been applied in a host of cases,* is a vital part of the federal regulation of natural gas and electric companies,

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* See, e.g., among many others, *South Carolina Generating Co.* v. *Federal Power Com'n*, 261 F. 2d 915, 920 (Cir. 4, 1958), and cases there cited; *Pennsylvania Water & Power Co.*, 8 F.P.C. 1, 19, 23 (1949); *The Montana Power Co.*, 4 F.P.C. 213, 228 (1945); *St. Croix Falls M.I. Co.*, 3 F.P.C. 13, 20, 21 (1942); *Pennsylvania Power & Light Co.*, 3 F.P.C. 89; *Louisville Hydro-Electric Co.*, 1 F.P.C. 130.

and is crucial to the statutory purpose of protecting the consumers of natural gas and electricity against excessive rate charges.

Without appropriate safeguards, however, the application of the no-profit rule threatens to be self-defeating. The financial integrity of public utility companies depends on their ability to derive a fair return from, and to amortize, their investments. The elimination of large amounts of invested capital from the rate base undermines, therefore, the companies' financial integrity. Without a sound financial structure, the companies cannot fulfill the statutory purpose of assuring a reliable supply of natural gas and electricity to the consuming public; nor can they hope to attract essential capital from investors. The interests of consumers and investors alike are at the heart of the statutory scheme; *Federal Power Com'n* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603, 605 (1944); *Colorado Interstate Gas Co.* v. *Federal Power Com'n*, 209 F. 2d 717, 724 (Cir. 10, 1954); *State Corporation Com'n* v. *Federal Power Com'n*, 206 F. 2d 690, 721 (Cir. 8, 1953).

The operation of the no-profit rule thus involves a conflict between the statutory purpose of protecting consumers against excessive rate charges and the statutory purpose of maintaining the financial integrity of utility companies. The task of balancing these conflicting interests rests with the FPC. The Commission has resolved the conflict in the very proceeding which gave rise to the present action. The dissenting opinion of Commissioner O'Connor pointed to the $8,000,000 loss sustained by Transmission and its stockholders through the elimination of that amount from the rate base (p. 94a). The Commission's majority opinion

responded that the $8,000,000 need not be lost; it may be recouped through legal action against the insiders for their unlawful profits (p. 89a).

The claim for recoupment is thus an integral element of the federal regulation of natural gas and electric companies. The loss inflicted on the utility companies and their stockholders through the curtailment of the rate base is compatible with the broad statutory purposes because of the remedy available against the wrongdoing insiders. The allowance of the claim is the indispensable correlate of the rule excluding insiders' profits from the rate base.

The present action asserts that claim against Transmission's insiders or affiliates. It rests on the age-old principle that a fiduciary cannot make a profit from dealing with the trust property and is accountable for the losses he inflicts on his cestui through breach of his duties. Respondents are the directors and controlling stockholders of the gas companies. "A director is a fiduciary. So is a dominant or controlling stockholder or group of stockholders;" *Pepper* v. *Litton*, 308 U.S. 295, 306 (1939; citations omitted). Respondents breached their fiduciary duties: In order to seek personal gain, they awarded Transmission's construction and engineering contracts to themselves, although they knew the danger that their potential profits might be excluded from Transmission's rate base.

Respondents' liability has its roots in federal law. The no-profit rule, a principle of federal law and administration, embodies the fiduciary maxim that "a trustee ought not to make a profit dealing with a trust"; *St. Croix Falls M.I. Co., supra* (3 F.P.C., at 21), citing *Wardell* v. *Union Pacific R. Co.*, 103 U.S. 651, 657-8 (1881), and other de-

cisions of this Court. The common-law fiduciary principle has thus become part of the federal law governing the relations between natural gas and electric companies and their directors and controlling stockholders. This federalization of the common law is no isolated phenomenon; in recent years, the federal law governing federally controlled companies has emphasized the fiduciary principle with ever sharpening insistence.* Under the Natural Gas Act and the Federal Power Act, the recognition and enforcement of fiduciary claims such as those here alleged is of pivotal importance to the effective administration of the statutes.

**2. The decision below effectively defeats the policy of the Natural Gas Act and the Federal Power Act and misapplies Florida state law.**

The manner of applying a statute of limitations may be just as destructive of a claim as the complete refusal to enforce it. The Court below has so applied the statute of limitations as to nullify the gas companies' right to recoup their losses and respondents' profits. In reaching its conclusion, the Court enunciated rules of law contrary to established principles of federal and Florida state law. If the decision below is permitted to stand, it will effectively outlaw the right of natural gas and electric companies to seek the kind of judicial redress which the FPC deemed essential to the administration of the no-profit rule.

This result flows inevitably from the holding of the Court of Appeals that petitioner's claims accrued, and the three-year statute of limitations began to run, in November 1958, when respondents awarded the construction and engineer-

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* See, *e.g.*, *S.E.C.* v. *Capital Gains Research Bureau*, 375 U.S. 180, 193-4 (1963; Investment Advisers Act); *Brown* v. *Bullock*, 294 F. 2d 415, 421 (Cir. 2, 1961; Investment Company Act).

ing contracts to themselves. At that time, petitioner could not have sued for respondents' profits because they had none, nor could he have sued for the damages of the gas companies because they had not suffered any.

(a) The Court below recognized that "limitation never commences to run until the time when the plaintiff could first have maintained his action to a successful result" (p. 6a). Had this action been brought and tried in November 1958, the result could not possibly have been "successful". It is thoroughly settled that an action—legal or equitable—to recover damages from wrongdoing corporate directors must be dismissed unless the plaintiff proves that the wrongdoing resulted in actual damages to the corporation.* No such proof would have been possible in November 1958.

The only damages sought and recoverable in this action are those due to the elimination of respondents' profits from Transmission's rate base. In November 1958, Transmission had no rate base (because the pipeline was not yet built); respondents had no profits (because they had not yet performed their services); and, of course, the nonexistent profits had not been eliminated from the nonexistent rate base. Respondents did not realize their profits until 1960; proceedings for their elimination from the rate base were not commenced until 1962; their actual elimination did not occur until 1964.

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* *Johnson* v. *Kennedy*, 201 Ga. 838, 845, 41 S.E. 2d 522, 526 (1947); *Martin* v. *Hardy*, 251 Mich. 413, 420, 232 N.W. 197, 199 (1930); *Flack* v. *Domestic L. & A. Ins. Co.*, 232 Ky. 176, 178-9, 22 S.W. 2d 582 (1929); *Commercial Bank* v. *Ten Eyck*, 48 N.Y. 305, 307, 311-2 (1872); *Cleary* v. *Higley*, 154 Misc. 158, 277 N.Y.S. 63, 79 (1934), aff'd 246 App. Div. 698, 284 N.Y.S. 989 (1935); 3 *Fletcher, Corp.* (1965), § 992, p. 533.

Indeed, had this action been brought and tried in November 1958, petitioner would have had to state that *perhaps* the contracting firms would derive profits from their services; that *perhaps* the FPC would exclude these profits from the rate base; and that, *if* these two events should happen, the gas companies would sustain a loss. On the strength of such statements, the court would inevitably have dismissed the action. It would have told petitioner: "Wait until respondents do realize profits. Then wait until the FPC does exclude the profits from the rate base. Perhaps these events will never take place. You cannot sue for damages or profits unless and until they actually arise."

To hold, as did the Court below, that limitations began to run in November 1958 is tantamount to outlawing the claims before they could ever be successfully asserted.

(b) The destructive effect of the decision below is not limited to this particular case. Whenever the insiders of natural gas or electric companies award construction contracts to themselves, a great deal of time is bound to pass before their profits are realized. Much further time must run before the FPC invokes the no-profit rule, before it renders its decision and before the case completes its way through the courts. In the present instance, six years elapsed from the award of the contracts until the FPC actually excluded respondents' profits from Transmission's rate base. Similar delays will occur in similar cases. If the running of limitations were to start at the time of the contract awards—as the Court below held—the judicial remedy would be condemned to futility.

(c) The Court below erroneously held that, as of November 1958, only the "amount" of damages remained to be "computed" or "ascertained" at a later date (pp. 9a, 10a). To the contrary, no damages at all had arisen at the time, and none were certain to arise thereafter. Respondents themselves admit that, as of November 1958, they "stood not only possibly to make a profit, but to the contrary stood to sustain a loss" (p. 22a). The uncertainty thus related not only to the amount, but to the very existence of future profits and damages. Equity will not decree an accounting of damages or profits when none have arisen at the time of suit and trial and when no certainty exists that they will ever arise in the future.

The holding below that respondents' fiduciary breach, committed in November 1958, gave petitioner an immediate right to an accounting of the damages that "would accrue" therefrom in the future (p. 10a) is contrary to Florida and to general law. A fiduciary's breach of trust does not give rise to liability unless and until it results in actual gain to him or actual loss to his cestui; 2 *Scott on Trusts* (2d Ed., 1956), § 205, p. 1523, and authorities cited *supra* p. 14. The two Florida cases cited by the Court (p. 9a)* merely hold that a fiduciary relation gives the right to an accounting in equity; but in both cases the items to be accounted for lay in the past. *Town of Miami Springs* v. *Lawrence,* 102 So. 2d 143 (Fla., 1958), discussed in Judge Rives' dissenting opinion (p. 20a) but ignored by the majority, holds that limitation does not begin to run until "actual harm" is inflicted on the plaintiff, regardless of the date of the defen-

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* *R. O. Holton & Co.* v. *Hull,* 140 Fla. 687, 192 So. 229 (1940); *Royal Indemnity Co.* v. *Knott,* 101 Fla. 1495, 1507, 136 So. 474, 478 (1931).

dant's wrongful act.* An accounting for future damages would be unprecedented and, lacking a crystal ball, impossible.

The Court quotes (p. 4a) the allegation of the complaint that the award of the 1958 contracts to affiliates "exposed Transmission and Florida Gas to the danger that the FPC might eliminate" their profits from the rate base (R. 71). The authorities, however, are clear that the exposure to *potential* injury is not actual injury and does not start the running of limitations. See *Carnes* v. *United States,* 186 F. 2d 648, 650 (Cir. 10, 1951):

> "Though negligence may endanger the person or property of another, no actionable wrong is committed if the danger is averted. It is only the injury to person or property arising from negligence which constitutes * * * an actionable wrong."

The Fifth Circuit itself has held that

> "it is not the wrongful, i.e., the negligent act, which gives rise to the claim. For there must be damage caused by it. Until there is *some* damage, there is no claim and certainly a statute prescribing the time in which suit must be filed (whether as a condition of right or remedy) can never operate prior to the time a suit would be permitted."
>
> *United States* v. *Reid,* 251 F. 2d 691, 694 (Cir. 5, 1958).

We submit that the application of the statute of limitations by the Court below was contrary to any applicable law,

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* Accord: *U.S.* v. *Reid,* 251 F. 2d 691, 694 (Cir. 5, 1958); *Dodd* v. *Pittsburgh, etc. R. Co.,* 127 Ky. 762, 787, 106 S.W. 787, 794 (1908); *Theurer* v. *Condon,* 34 Wash. 2d 448, 209 P. 2d 311 (1949).

deprived Transmission and its public stockholders of any effective remedy for the misconduct of their fiduciaries, and defeated the salutary purposes of the National Gas Act.

**3. The importance of review by this Court.**

Review by this Court of the decision below is imperative because:

(a) The holding below that petitioner's claims accrued at the time of the contract awards is not based on any peculiarity of Florida law. If sound, it would apply equally under the laws of any of the fifty states. The precedental effect of the decision is thus broad and comprehensive.

(b) The decision below casts a pall on the FPC's administration of the Natural Gas Act and the Federal Power Act. As indicated by the Commission's prevailing and dissenting opinions in this case, the FPC would hesitate to apply the no-profit rule unless the company thus affected has a remedy for its loss against the wrongdoing insiders. Since the decision below effectively precludes such remedy, it jeopardizes the Congressional intent to protect the consumers against excessive rate charges.

(c) The decision below encourages the directors and other affiliates of federally regulated natural gas and electric companies to seek personal gain at the expense of their cestuis. They may award profitable construction and engineering contracts to themselves, sheltered from any accountability for the resulting corporate losses by the umbrella of limitations which the Court below places in their hands.

(d) The effect of the decision below in the present case is to deprive the gas companies' 25,000 stockholders (R 74)

of any redress for the loss of an $8,000,000 investment at the hands of their fiduciaries. The magnitude of the loss and the great number of the victims argue forcefully for review by this Court.

(e) The questions raised by the decision below, affecting a claim rooted in federal law, are novel. They are of vital interest not only to the parties, but to the entire industry. Their resolution is of grave concern to all consumers of natural gas and electricity and to all present and potential investors in the securities of federally regulated utility companies. The questions, we submit, should be reviewed by this Court.

## II.

**The modification of the District Court's decision by the Court of Appeals so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.**

The District Court dismissed petitioner's profit claim without prejudice as premature. It thus preserved petitioner's right to renew his action after the FPC's decision of the rate base proceeding becomes final. Although only petitioner appealed, the Court of Appeals took away this right by directing that the claim be dismissed with prejudice.

This disposition is in direct conflict with a rule thoroughly established by a long and unbroken line of decisions of this Court and nearly all the Courts of Appeals. In the absence of a cross-appeal, the rule against a *reformatio in pejus* forbids an appellate court to modify the lower

court's decision to the detriment of the appellant. *Letulle* v. *Scofield,* 308 U.S. 415, 422 (1940); *Helvering* v. *Pfeiffer,* 302 U.S. 247, 251 (1937); *Canter* v. *American Insurance Co.,* 3 Pet. 307, 318 (1830); *Tallman* v. *Udall,* 324 F. 2d 411, 417 (Cir. D.C., 1963); *Zelinger* v. *Uvalde Rock Asphalt Co.,* 316 F. 2d 47, 53-54 (Cir. 10, 1963); *Schildhaus* v. *Moe,* 319 F. 2d 587, 588 (Cir. 2, 1963)—all with numerous additional citations. In the words of Mr. Justice Cardozo, "'The rule is inveterate and certain''; *Morley Construction Co.* v. *Maryland Casualty Co.,* 300 U.S. 185, 191 (1937).

By changing a dismissal without prejudice to one with prejudice, the Court of Appeals modified the District Court's decision to petitioner's detriment. This, we submit, it could not do. Judge Rives, dissenting, properly so held (pp. 17a-18a).

Judge Simpson suggested that petitioner is not aggrieved by the change because his profit claim is barred, in any event, by the statute of limitations, so that the added bar of res judicata (arising from the dismissal with prejudice) imposes no further burden (pp. 16a-17a). We respectfully disagree. When the District Court ruled that petitioner's profit claim was premature, it necessarily held that the claim is not barred by limitations. This holding became final since respondents have not appealed from it. As between petitioner and respondents, it constitutes a binding adjudication—conclusive under the rules of estoppel by judgment—that the profit claim will not accrue until the FPC's rate base decision becomes final. If, at that time, petitioner brings a new action on the profit claim, respondents will be estopped from raising the defense of limitations. The Court below lacked the power to relieve them from this disability.

This Court, we submit, should review the error of the Court of Appeals. The decision below, as we have said, is contrary to a rule firmly settled by this Court and the other Courts of Appeals. It constitutes a flagrant departure from the accepted and usual course of judicial procedure.

The rule forbidding a *reformatio in pejus* is an essential part of appellate procedure. Any infraction would hamstring the right to appeal from an adverse decision; for an aggrieved party might well hesitate to seek review at the risk of losing such benefits as he secured in the court of first resort. This Court, we submit, should be on guard against erosion of the rule.

## CONCLUSION

**For the reasons given, petitioner respectfully prays that the writ be granted.**

Respectfully submitted,

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